82-846

No.

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL F. JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where petitioner was engaged in an ongoing, legitimate business, from the premises of which, marijuana was being distributed; the only evidence purporting to link him with any marijuana conspiracy was a hearsay statement of an alleged co-conspirator;* and the reviewing court affirmed upon concluding that "It is of course *possible* that Jones was involved only in the legitimate side of the business, but it is *highly unlikely* given that bales of marijuana were stored at the shop; and there was other evidence, besides the *probabilities inherent in the situation,* linking Jones to the marijuana conspiracy,"† did the jury verdict finding petitioner guilty of conspiracy to distribute marijuana violate petitioner's due process rights under *Jackson* v. *Virginia,* 443 U.S. 307, and its judicial progenitors?#

2. Given the above-stated circumstances: did the Seventh Circuit's manner of affirmance—utilizing such concepts as "possible," "highly unlikely," and "probabilities inherent in the situation," in reaching its conclusion that the government had satisfied its burden of

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* In the words of the trial court, denying petitioner's motion for judgment of acquittal on Count 1, the totality of the evidence against him on that count was:

> "And Beck told Kaganowich at a plant sale . . . that Jones and Tabeling were pointed out by Beck as the suppliers of the marijuana." (Tr. 566, referring to Tr. 473)

The government conceded in its Brief in the Seventh Circuit that this was the *only* evidence against petitioner on Count 1 (conspiracy to distribute marijuana). (G. Br. p. 7)

† Unpublished Order of Court of Appeals herein, p. 2. (App. A, p. 2). (Emphasis added.)

I.e.: *In Re Winship,* 397 U.S. 358; *Cool* v. *United States,* 409 U.S. 100; *Thompson* v. *Louisville,* 362 U.S. 199.

proof**—violate petitioner's due process rights, as follows:

A. as expressed in *Jackson* v. *Virginia* and its predessors, *supra*, by encroaching on the constitutionally-rooted reasonable doubt standard and presumption of innocence; and/or,

B. as expressed in *Leary* v. *United States*, 395 U.S. 6, and its judicial antecedents,†† by utilizing an irrational presumption?

Parties Involved*

Petitioner, Samuel F. Jones, was one of 2 defendants in the District Court for the Central District of Illinois, Danville Division, and one of the 2 appellants in the Court of Appeals for the Seventh Circuit.† Respondent, the United States of America, was the prosecution (plaintiff) in the trial court and the appellee in the Court of Appeals.

** Order, p. 2; App. A, p. 2.

†† *I.e.*: *Tot* v. *United States*, 319 U.S. 463; *United States* v. *Romano*, 382 U.S. 136; *United States* v. *Gainey*, 380 U.S. 63.

* Per Rule 21.1(b).

† Petitioner Jones was indicted with Larry Tabeling and Gary Kaganowich in Indictment No. CR 80-20041. Kaganowich testified for the government; the indictment against him was dismissed. (Tr. 1922) Jones and Tabeling were tried together; both were convicted. Their consolidated appeals (Tabeling, No. 81-2006; Jones, No. 81-2007) were disposed of by a single Unpublished Order. (App. A)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Samuel F. Jones (hereafter, defendant, or Jones) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming his conviction for conspiracy to distrbute marijuana.[1]

[1] Via this Petition, filed on his own behalf, Jones seeks review only of the Count 1 conviction for conspiracy to distribute marijuana.

He also seeks review of the Count 1 and Count 2 convictions (conspiracy to distribute cocaine) for the separate reasons advanced in the certiorari petition of Larry Tabeling, to the extent the said petition may be applicable to him—specifically, issues respecting illegal seizure of articles from Tabeling in violation of the Fourth Amendment, and the improperly compelled, purportedly immunized testimony of reluctant government witness Angela Blair. Jones hereby joins in said applicable portions of Tabeling's separate Petition for Certiorari as permitted by Rule 19.4 of this Court.

Judgment and Order Below

The Order of the Court of Appeals for the Seventh Circuit, No. 81-2007 (consolidated with No. 81-2006), unpublished per Circuit Rule 35, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On July 27, 1982, the Court of Appeals for the Seventh Circuit entered its Order affirming defendant's convictions. (App. A) Defendant Jones' timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on September 27, 1982. (App. B) This petition to review the judgment of a federal court of appeals in a criminal case is timely filed within 60 days after denial of petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 20.1 & 20.4 of this Court.

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall be . . . deprived of . . . liberty . . . without due process of law; . . ."

Title 21, United States Code, sec. 841(a)(1) provides, in pertinent part:

> "§ 841. *Prohibited acts A—Unlawful acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to . . . distribute . . . a controlled substance;"

Title 21, United States Code, sec. 846 provides:

"§ 846 *Attempt and Conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Nature of the Case

Defendant, together with Larry Tabeling and Gary Kaganowich, was charged in Indictment No. CR 80-20041 with (Count 1) conspiracy to distribute marijuana and (Count 2) conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 & 841 (a)(1). (Grp. App. 1)[2] Kaganowich testified for the government in exchange for dismissal of the charges. (Tr. 464-65)

Jones and Tabeling were found guilty as charged (on both Counts 1 and 2) by the jury. The court sentenced Jones to 5 years imprisonment and a $5,000.00 fine as to Count 1; 12 years imprisonment and a $5,000.00 fine as to Count 2; said sentences of imprisonment to run concurrently. (Grp. App. 7)

On Jones' appeal, consolidated with that of Tabeling, the Court of Appeals for the Seventh Circuit affirmed. (App. A)

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[2] Hereafter: "Grp. App." refers to various numbered Group Appendices included within the Consolidated Appendix of Jones and Tabeling, filed in the Seventh Circuit in their consolidated appeal (Nos. 81-2006 &-2007); and "Tr." refers to the Transcript of Proceedings in the District Court.

This petition for certiorari attacks only Jones' Count 1 conviction for conspiracy to distribute marijuana. Because the existence of the additional conviction will affect parole consideration, the merits should be reached although we do not also individually attack the Count 2 (cocaine conspiracy) conviction.[3]

If the Court agrees that the Count 1 conviction should be reversed, then, in addition to whatever relief the Court may deem appropriate upon Count 1, the sentence upon Count 2 should be vacated and the cause remanded for resentencing, since the trial court's sentencing decision upon Count 2 necessarily was influenced by Jones' conviction upon Count 1—for a separate conspiracy to distribute a different controlled substance—during the course of the same trial.

Jurisdiction of the Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant was charged with having committed offenses against the laws of the United States, to wit, 21 U.S.C. 846 & 841(a)(1).

Statement of Facts

The facts generally are set out in the reviewing court's order, (App. A). Specific facts relevant to the *Questions Presented* are:

During the course of the trial, the District Court held a hearing as mandated by *United States* v. *Santiago*, 582 F.2d 1128 (7 Cir. 1978).

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[3] Jones also attacks both Count 1 and Count 2 by joining in Tabeling's separate petition for certiorari, insofar as the said petition may be applicable to Jones. See footnote 1, *supra*.

During the *Santiago* hearing, the court stated:

> "[Ms. Prosecutor,] what evidence did I hear that ties Jones into the conspiracy to sell marijuana? . . . where does Jones get tied into the sale of marijuana? The only connection is his partnership with Tabeling, is, Jones' partnership with Tabeling and the Plant Connection [a legitimate business venture] and that Kaganowich visited the Plant Connection with Beck at one time to pick up marijuana. What evidence ties Jones in other than Jones' business relationship with Tabeling?" (Tr. 98)

And, responding to the prosecutor's answer, the court stated:

> "I think you are answering me by saying that Jones is tied to marijuana because Jones is tied to Tabeling." (Tr. 99-100)

In determining that there was sufficient evidence to permit the jury to consider hearsay of co-conspirators against Jones with respect to Count 1 (marijuana conspiracy), the court stated:

> "If the burden was greater than a preponderance, I don't think I could find it. If it had to be a measure other than more probably true than not I would have misgivings, but I am comfortable with it being more probably true than not." (Tr. 103-04)

In denying Jones' motion for judgment of acquittal on Count 1, the trial court found that the totality of the evidence against him on that Count was—as it had been at the close of the *Santiago* hearing—as follows:

> "And Beck [an unindicted co-conspirator] told Kaganowich at a plant sale . . . that Jones and Tabeling were pointed out by Beck as the suppliers of the marijuana." (Tr. 566, referring to Tr. 473.)

The government conceded on appeal that this was the *entirety* of the evidence against Jones on Count 1. (G. Br. p. 7)

In rejecting Jones' argument on appeal that the evidence was wholly insufficient to make him out a party to any marijuana conspiracy, the Court of Appeals states:

> "Jones complains that there was insufficient evidence that he participated in the conspiracy to sell marijuana. The evidence showed that he and Tabeling were partners in a store called *The Plant Connection* from which marijuana was sold. *It is of course possible that Jones was involved only in the legitimate side of the business, but it is highly unlikely given that bales of marijuana were stored at the shop;* and *there was other evidence, besides the probabilities inherent in the situation, linking Jones to the marijuana conspiracy* . . . —enough to satisfy the government's burden of proving guilt beyond a reasonable doubt." (App. A, p. 2) (Emphasis added.)

While stating that "there was other evidence, besides the probabilities inherent in the situation, linking Jones to the marijuana conspiracy," *ibid.*, the Seventh Circuit fails to set out any such evidence. There is none.

The Court of Appeals affirmed in all respects. (App. A)

REASONS FOR GRANTING THE WRIT

The decision below seriously erodes due process principles as set out in Jackson v. Virginia, 443 U.S. 307, and Leary v. United States, 395 U.S. 6, and their respective judicial antecedents, by irrationally and improperly presuming an essential element of the marijuana conspiracy offense—that is, that Jones was a knowing participant in a conspiracy to distribute marijuana—where there was no sufficient evidence linking him with any marijuana conspiracy.

Certiorari should be allowed to bring the Court of Appeals for the Seventh Circuit in line with established precedent interpreting vital aspects of due process of law involving the burden of proof beyond a reasonable doubt, the presumption of innocence, and the prohibition against irrational presumptions.

This case is of exceptional import to the criminal justice system, and presents an excellent vehicle whereby this Court may deliver an unmistakable message to the Courts of Appeal discouraging a disturbing tendency to minimize the most basic due process safeguards on review.

Here, the reviewing court has affirmed defendant's conviction on the marijuana conspiracy count, absent evidence that he had any knowledge that marijuana was being distributed from the premises where he was partner in a legitimate, ongoing business. (See App. A, p. 2; see also Tr. 98.) By irrationally presuming, absent evidence, that Jones had such knowledge—an element of the offense—the reviewing court's decision conflicts with the due process principles of the following cases from this Court, considered as a whole: *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), *Leary* v. *United States*, 395 U.S.

6, 23 L.Ed.2d 57 (1969), and cases cited and relied on in each of those decisions, as hereinafter set forth.

* * *

In rejecting Jones' argument that the evidence was utterly insufficient to make him out a party to any marijuana conspiracy, the Seventh Circuit states:

> "Jones complains that there was insufficient evidence that he participated in the conspiracy to sell marijuana. The evidence showed that he and Tabeling were partners in a store called *The Plant Connection* from which marijuana was sold. *It is of course possible that Jones was involved only in the legitimate side of the business, but it is highly unlikely given that bales of marijuana were stored at the shop;* and *there was other evidence, besides the probabilities inherent in the situation, linking Jones to the marijuana conspiracy* . . . —enough to satisfy the government's burden of proving guilt beyond a reasonable doubt." (App. A, p. 2) (Emphasis added.)

While stating that "there was other evidence, besides the probabilities inherent in the situation, linking Jones to the marijuana conspiracy," *ibid.*, the reviewing court fails to set out any such evidence. Indeed, there is none, with one miniscule exception.

The sole and only evidence tending to "link" Jones with a marijuana conspiracy is as follows:

> "Jones and Tabeling were pointed out by Beck [to Kaganowich] as the suppliers of the marijuana." (Tr. 566; comment of trial court, referring to Tr. 473.)

This supposedly took place at an open-air cash and carry "tent sale" of plants. (Tr. 566; see Tr. 57-58.)

Aside from this casual, supposed identification, not one of the government's witnesses directly implicated Jones in connection with the marijuana conspiracy. (See, *e.g.*, Tr. 274-75; 314-43.) Indeed, the trial judge noted:

"Didn't Beck testify that he got the marijuana from Tabeling?" (Tr. 98)

* * *

The trial judge was gravely concerned about the posture of the evidence in connection with the mandatory (in the Seventh Circuit) *Santiago* hearing [per *United States* v. *Santiago*, 582 F.2d 1128 (7 Cir. 1978)]. During the course of the hearing, the court stated:

"[Ms. Prosecutor,] what evidence did I hear that ties Jones into the conspiracy to sell marijuana? . . . where does Jones get tied into the sale of marijuana? The only connection is his partnership with Tabeling, is, Jones' partnership with Tabeling and the Plant Connection [a legitimate business venture] and that Kaganowich visited the Plant Connection with Beck at one time to pick up marijuana. What evidence ties Jones in other than Jones' business relationship with Tabeling?" (Tr. 98)

And, responding to the prosecutor's answer, the court stated:

"I think you are answering me by saying that Jones is tied to marijuana because Jones is tied to Tabeling." (Tr. 99-100)

The judge's statement in connection with his ultimate *Santiago* finding demonstrates that the evidence was, as a matter of law, constitutionally insufficient per *Jackson* v. *Virginia, supra;* for the judge said, candidly:

"If the burden was greater than a preponderance, I don't think I could find it. If it had to be a measure other than more probably true than not I would have misgivings but I am comfortable with it being more probably true than not." (Tr. 103-04)

The court's *Santiago* finding permitted the jury to consider co-conspirator hearsay evidence against Jones with respect to the marijuana conspiracy. (Tr. 100-03)

The evidence at the close of the entire case was no greater against Jones as to Count 1. Though denying Jones' motion for acquittal on that Count, the trial court found that the totality of the evidence against him as to marijuana was—as it had been at the close of the *Santiago* hearing, when the court had indicated it could not have found a burden "greater than a preponderance," (Tr. 103)—as follows:

> "And Beck [an unindicted co-conspirator] told Kaganowich at a plant sale . . . that Jones and Tabeling were pointed out by Beck as the suppliers of the marijuana." (Tr. 566, referring to Tr. 473.)

On appeal, the government conceded that this was the entirety of the evidence against Jones on Count 1. (G. Br. p. 7)[4]

* * *

Since there was no evidence sufficient to support a rational conclusion that Jones was party to a marijuana conspiracy, the jury's verdict finding him guilty on Count 1 violates the due process standard of *Jackson* v. *Virginia*, *supra*. Under *Jackson*, a conviction cannot stand if, taking the evidence most favorably to the prosecution, no reasonable jury could have found defendant guilty as to each element of the offense. 443 U.S. at 324, 61 L.Ed.2d at 576-77. Here, the trial judge was "comfortable" with it [*i.e.*,

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[4] Moreover, as was urged in our Brief (Def. Br. p. 38) and reiterated in our Reply Brief (Def. Reply Br. p. 3), but wholly ignored by the reviewing court, this isolated, lone bit of evidence was impermissible hearsay. See, *e.g.*, *United States* v. *Gaudara*, 586 F.2d 1159 (7 Cir. 1978); *United States* v. *Guajardo-Melendez*, 401 F.2d 35, 37 (7 Cir. 1968); *cf. United States* v. *Rohalla*, 369 F.2d 220 (7 Cir. 1966). Nor can the jury be expected to be capable of compartmentalizing the evidence so as not to be influenced thereby. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123, 20 L.Ed.2d 476 (1968); *accord*, *United States* v. *Guajardo-Melendez*, *supra*.

Jones' alleged connection with a marijuana conspiracy] "being more probably true than not," but, "If the burden was greater than a preponderance, I don't think I could find it." (Tr. 103-04)

Moreover, the mental leap of the reviewing court—whereby the appellate judges have presumed facts necessary to support a finding of Jones' guilt on Count 1 from a record devoid of any supporting evidence and from "the probabilities inherent in the situation," (App. A, p. 2)—violates the due process principle reiterated in *Leary, supra,* forbidding convictions based on irrational presumptions.

• • •

In *Jackson, supra,* this Court held, in no uncertain terms, that a conviction violates due process unless there is sufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt as to each element of the offense. While *Jackson* involved a State conviction, there appears to be no doubt that the Fourteenth Amendment due process principles therein elucidated translate exactly to Fifth Amendment due process principles when a federal conviction is challenged on equivalent grounds. *United States* v. *Tranowski,* 659 F.2d 750 (7 Cir. 1981) (reversing).

Your Honors in *Jackson, supra,* expressly relied on principles established in *In Re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368 (1970), to wit:

> "In *Winship,* the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt. . . .' " 433 U.S. at 315, 61 L.Ed.2d at 571, quoting from *Winship, supra,* 397 U.S. at 364, 25 L.Ed.2d at 375.

In *Winship*, Your Honors could not have stated it more strongly:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 25 L.Ed.2d at 375.

Consider the Seventh Circuit's language here:

> "It is of course *possible* that Jones was involved only in the legitimate side of the business, but it is *highly unlikely* given that bales of marijuana were stored at the shop; . . ." (App. A, p. 2) (Emphasis added.)

Absent any additional evidence—the reviewing court's claim that there was "other evidence" being without foundation in the record—this is just such a case for which the reasonable doubt standard was designed.

Consider the reasons given for the constitutionally-required rule:

> "The standard of proof beyond a reasonable doubt, said the Court [in *Winship, supra*], 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson, supra*, 443 U.S. at 315, 61 L.Ed.2d at 571, quoting from and paraphrasing *Winship, supra*, 397 U.S. at 363, 25 L.Ed.2d at 375.

The presumption of innocence, of course, is constitutionally rooted; it is part and parcel of due process of law. *Cool* v. *United States*, 409 U.S. 100, 104, 34 L.Ed.2d 335, 339 (1972). Without strict enforcement of the reasonable doubt standard, this basic presumption of innocence, inherent in our jurisprudence, flies out the judicial window.

Here, because there was no evidence from which a rational fact-finder could find, beyond a reasonable doubt, that Jones participated in a marijuana conspiracy, his conviction upon Count 1 violates due process, per the principles above set forth.

* * *

Following a line of cases including *Tot* v. *United States*, 319 U.S. 463, 87 L.Ed. 1519 (1943), *United States* v. *Gainey*, 380 U.S. 63, 13 L.Ed.2d 658 (1965), and *United States* v. *Romano*, 382 U.S. 136, 15 L.Ed.2d 210 (1965), this Court in *Leary* v. *United States*, *supra*, held unconstitutional—as violative of due process—a statutory presumption whereby from the fact of possession of marijuana, the finder of fact could presume that the possessor had knowledge of illegal importation of the substance. Similarly, in each of the cited predecessor cases, a presumption, wherein the fact presumed was not rationally connected to the fact proved, was held unconstitutional.[5]

Using reasoning identical to that condemned in the foregoing cases, the Seventh Circuit's flight of fancy judicial gymnastics, necessary to sustain Jones' Count 1 conviction, just as certainly violates his due process rights. The mental processes of the appellate judges here necessarily

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[5] *Tot*, *supra*, first established the principle that there must be a rational connection between the fact proved and the fact presumed. There, this Court held that a presumption that a firearm had moved in interstate commerce, was violative of due process. In *Gainey*, *supra*, the Court struck down a presumption permitting an inference, from a defendant's presence at an illegal still, that he was "carrying on" the business of a distiller, absent an explanation of his presence to the jury's satisfaction. Similarly, in *Romano*, *supra*, the Court held unconstitutional a statutory presumption authorizing the inference, from defendant's presence at an illegal still, that he had possession, custody, or control of the still.

involves an irrational leap to the ultimate fact—that is, defendant's participation in a marijuana conspiracy. The leap is irrational simply because there is no evidence to support the conclusion of his guilt upon Count 1. See *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed.2d 654 (1960).

* * *

By affirming defendant's conviction upon Count 1, the Seventh Circuit condones a conviction which violates his due process rights under *Jackson, supra.* And, by its manner of affirmance, the court further violates his due process rights under *Leary, supra.*

Pursuant to this Court's exercise of its supervisory power over the federal courts, certiorari should be allowed to correct the manifest injustice wrought by this aberrant conviction, in conflict with controlling precedent from this Court interpreting and applying those constitutional rights most basic to our system of justice.

CONCLUSION

For any or all of the foregoing reasons—or, for any of the applicable reasons as contained in Larry Tabeling's petition for certiorari[6]—certiorari should be allowed. And, upon the merits, Jones' convictions should be reversed.[7]

Respectfully submitted,

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[6] See pp. 1 & 4, footnotes 1 & 3, *supra.*

[7] See text accompanying and following textual reference to footnote 3, p. 4, *supra*, for possible alternative modes of relief.